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No. 83-2162

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PRISCILLA BELLAND, *et al.*,
Petitioners,
v.
PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Pension Benefit Guaranty Corporation's administrative determination that the Georgia-Pacific Portage Division Pension Plan terminated before the commencement of the "window period" for retroactive pension plan termination insurance was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

PARTIES TO THE PROCEEDING

Respondent Pension Benefit Guaranty Corporation ("PBGC") is an agency of the United States government which was created by 29 U.S.C. § 1302(a). The petitioners are members of a certified class composed of participants in the Georgia-Pacific Portage Division Pension Plan. Other appellees in the court of appeals were Brown Company ("Brown") and Georgia-Pacific Corporation ("Georgia-Pacific").

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a)[1] is reported at 726 F.2d 839. The opinion of the district court granting summary judgment for the Pension Benefit Guaranty Corporation (Pet. App. 26a-35a) is not reported.

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[1] Hereinafter, "App." refers to the Appendix to this Brief in Opposition, "Pet. App." denotes references to the Appendix to the Petition, and "Pet." refers to the Petition.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1984. The court of appeals denied a timely petition for rehearing on April 2, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 4402(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1461(b) (1982) (previously codified as ERISA § 4082(b), 29 U.S.C. § 1381(b) (1976)) is reproduced in the Appendix to the Petition at page 47a.

STATEMENT

1. The Operations at the Portage Plant.

The Georgia-Pacific Corporation ("Georgia-Pacific") purchased a paper products manufacturing plant in Portage, Michigan, from the Brown Company ("Brown") in 1971. Many of Brown's former employees continued working at the facility as employees of Georgia-Pacific and became participants in the Georgia-Pacific Portage Division Pension Plan (the "Georgia-Pacific Plan").

In March 1974, Georgia-Pacific announced its intention to close the Portage plant in June 1974. By June 1, 1974, only 23 employees remained out of the approximately 200 employees who had previously worked there. On or before June 30, 1974, all production and manufacturing activity at the Portage plant had ceased and all but two employees had been terminated. The two remaining employees continued working at the plant until July 3, 1974, in order to shut down plant operations by removing inventory

and equipment and loading it for shipment. Georgia-Pacific made no contributions to the Georgia-Pacific Plan for work performed at the plant after June 30, 1974, except with respect to the two employees who worked there until July 3, 1974.

2. The Initial Application for Termination Insurance.

After the plant closed, the pension plan trustees determined that there were insufficient assets to pay the participants the full amount of the benefits provided by the plan. In March 1975, the trustees announced that pension benefits would be reduced by 75 percent because of the unavailability of funds.

The Employee Retirement Income Security Act of 1974 ("ERISA") had been enacted on September 2, 1974, to provide a termination insurance program for certain pension plans. On September 13, 1974, the United Paperworkers International Union (the "Union"), the bargaining agent for the Georgia-Pacific Plan participants, applied for retroactive plan termination insurance under 29 U.S.C. § 1461(b). This section permits PBGC to pay the guaranteed benefits of certain pension plans which terminated before the enactment of ERISA if, among other things, the pension plans had terminated during ERISA's "window period" for retroactive plan termination insurance coverage—*i.e.*, between July 1 and September 2, 1974.

After several oral presentations and the submission of written materials by Georgia-Pacific and the Union, PBGC determined on June 27, 1975 that the Georgia-Pacific Plan had terminated prior to July 1, 1974, and that therefore it was not eligible for the retroactive "window period" coverage. *See infra* App. 1a-2a.

3. The Requests for Reconsideration.

PBGC subsequently agreed to reconsider its initial determination after counsel for Georgia-Pacific indicated that the company had discovered some additional information concerning the status of employment at the Portage plant in July 1974. In August 1975, Georgia-Pacific informed PBGC for the first time that it had made some contributions to the Georgia-Pacific Plan after June 30, 1974, on behalf of employees who had accrued benefits before the plant closed. Specifically, Georgia-Pacific reported that it had paid twelve employees for vacation time they had earned before June 30, 1984, and that nine employees had been paid "shortage pay" for wages earned before June 30 which Georgia-Pacific had erroneously failed to pay them earlier. In addition, Georgia-Pacific indicated that it had mistakenly paid nine employees holiday pay for July 4, 1974, although only the two employees who had worked at the plant from July 1 to 3, 1974, were entitled to such holiday pay pursuant to the collective bargaining agreement.

By letter dated December 24, 1975, PBGC notified Georgia-Pacific and the Union that after reviewing all the materials that had been submitted regarding the case, PBGC had again concluded that the Georgia-Pacific Plan had terminated on or before June 30, 1974, and that therefore the Georgia-Pacific Plan was not covered by ERISA's plan termination insurance. Pet. App. 38a-39a.

In June 1976, the Chairman of the PBGC Board of Directors, Secretary of Labor William J. Usery, Jr., responded to the inquiries of various state and federal elected officials, noting that "[t]he termination

of a pension plan is sometimes more a process than a single happening, and encompasses a number of events which may, and frequently do, take place at different times. Thus, the PBGC's determination under § 4082(b) is, in such cases, based on weighing the facts and circumstances of each particular case." Pet. App. 40a. He further stated that "[m]y colleagues on the Board and I are satisfied that the PBGC utilized criteria which constitute a reasonable basis and that the determination is supported by the evidence made available to the PBGC." Pet. App. 41a.

PBGC responded to these officials in October 1976 after it had again offered an opportunity for the submission of new information and conducted another full review of the facts and circumstances of this case. At that time, PBGC reaffirmed its initial determination that the Georgia-Pacific Plan had terminated before July 1, 1974. Pet. App. 43a-44a. Subsequent to a new Executive Director's review of this case, PBGC determined that the case should not be reopened. *See infra* App. 3a-4a.

4. The Litigation Commences.

On May 7, 1979, petitioners filed the instant action against PBGC, Georgia-Pacific, the Union and Brown. After a review of the administrative record, the district court granted PBGC's motion for summary judgment on June 30, 1981. The district court thereafter granted the summary judgment motions of Georgia-Pacific and Brown on December 30, 1982.[2]

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[2] Petitioners' motion to dismiss their action against the Union with prejudice was granted on March 18, 1983.

In a Memorandum Opinion granting PBGC's motion for summary judgment, the district court noted that the only issue before the court was whether PBGC's decision to deny termination insurance for this pension plan, pursuant to 29 U.S.C. § 1461(b), was arbitrary, capricious, an abuse of discretion or inconsistent with the law, since the parties had agreed that there were no genuine issues of material facts in dispute. Pet. App. 30a. Finding that "[i]n handling applications submitted for pension termination insurance, PBGC defined and applied a set of factors it determined would afford a reasonable and careful method of considering all relevant factors in making a decision on 'window period' coverage," the court ruled that PBGC's denial of pension benefit insurance to the Georgia-Pacific Plan had not been arbitrary or capricious, and did not lack a substantial reasonable basis. *Id.* at 34a-35a.

The court of appeals affirmed, with Judge Wald dissenting. It concluded that PBGC's interpretation of 29 U.S.C. § 1461(b) "adhered to an express statutory purpose and complied with the statute's plain language" (Pet. App. 9a), that PBGC did not commit a clear error in judgment in finding that the plan terminated before the "window period" (Pet. App. 12a), and that PBGC did not abuse its discretion in choosing to make "window period" decisions on a case-by-case basis rather than by promulgating a "window period" regulation (Pet. App. 13a-14a).

ARGUMENT

With the enactment of ERISA, Congress authorized PBGC to insure benefits retroactively for certain plans which had terminated in a "window period" between July 1 and September 2, 1974. 29 U.S.C. § 1461(b)(2) (1982). ERISA required that applications for "window period" coverage had to be filed no later than October 31, 1974. 29 U.S.C. § 1461 (b)(4) (1982). Approximately 200 such applications were submitted in the two-month period between the passage of ERISA on September 2, 1974 and October 31, 1984.

Section 1461(b) requires PBGC to determine whether a plan terminated during the "window period" for retroactive termination insurance "on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection." The legal issue here is whether PBGC was arbitrary and capricious when it determined that the statutory language—framed in the disjunctive—authorized PBGC to conclude that a terminated pension plan did *not* qualify because of a "reasonable basis consistent with the purposes" of the law.

Petitioners cannot claim that the decision below conflicts with that of any other court. Indeed, this is the only case in which a court has decided this issue and, because of the limited applicability of the "window period" provision, it is likely to be the only case dealing with this issue. Petitioners' stated objection to the conclusion of the PBGC is that it was an "abuse of discretion" to reject their application (Pet. 5)—hardly a ground for review by this court. Moreover, the decision below is entirely consistent with

the established principles of statutory construction that direct courts to defer to the interpretation given to a statute by the agency which administers it.

1. Language of the Statute.

The language of the law, which is the starting point for statutory analysis, plainly permits PBGC to use either of the statutory standards to determine whether a pension plan terminated during the "window period." As the court below said, "[s]ection 1461(b) is phrased unambiguously in the disjunctive." Pet. App. 8a.

Judge Wald's dissent argued that if PBGC could utilize the second of the alternative standards prescribed in section 1461(b), the first of the statutory tests would be rendered "meaningless." Pet. App. 23a. That conclusion is simply unwarranted. PBGC is empowered by the law to utilize *either* a single-focused standard based on the accrual of benefits *or* a standard based on a number of relevant considerations. This gives a meaningful policy choice to the agency. The statute would be less rational if it were read to *require* PBGC to insure a plan once the first, assertedly objective, standard had been met, irrespective of the agency's findings regarding other reasonable bases for granting or denying coverage in a particular case. It was, on the other hand, sensible for Congress to direct that if the agency concluded, in the exercise of its expertise, that the cessation of accrual of benefits should be the sole test, that determination would be a lawful one.

2. The Purpose of the Statute.

Petitioners and the dissenting judge below place heavy reliance on the remedial purpose of ERISA and on the ameliorative policies behind the "window period" provision. *See* Pet. 6-10; Pet. App. 18a-21a. However, Congress did *not* provide (as it easily could have) that, come what may, *any* plan under which *any* benefits accrued after June 30, 1974, should be covered by the insurance program.[3] With regard to the "window period," it directed that it was PBGC's job to "make the determination" whether the plan qualified. Thus, contrary to petitioners' contention that the Georgia-Pacific Plan *had* to be covered to carry out Congress' intention, the statute plainly empowered the PBGC to find, on an adequate statutory basis, that it was not insured.[4]

Moreover, the agency's construction of the statute which it is authorized to administer is entitled to

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[3] Petitioners essentially urge that the statute be rewritten to grant PBGC authority to apply the "other reasonable basis" test only "to *expand* coverage to those plans which would not qualify under the 'ceased to accrue' test." Pet. 11 (emphasis in original). Neither the language of the law nor its legislative history supports such a limitation on the judgment of PBGC. Pet. App. 9a.

[4] The case mentioned by Representative Thompson and quoted in the petition and in the dissenting opinion (Pet. 8-9; Pet. App. 20a) was one in which the pension plan continued in existence for a substantial period after the closing of the particular plant. (The Congressman's statement was made on August 20, 1974, and the plan was still in existence as of that date.) Thus, even if the statement made by a single Congressman could be accepted as reflecting the intent of the full Congress, *but see Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979), Mr. Thompson's illustration would not control this case.

great deference. *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The PBGC determined that the purpose of the law would not be effectuated by a wooden application of the first statutory test. That conclusion was properly given deference by the majority of the court of appeals. Pet. App. 7a-9a. The court of appeals ruled that PBGC's use of the "other reasonable basis" test here was consistent with the express purposes of section 1461(b), noting that "the entire statute is a finely tuned balance between protecting pension benefits for employees while limiting the cost to employers." Pet. App. 8a (quoting *A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation*, 634 F.2d 1013, 1021 (6th Cir. 1980)).

3. The Application of the Alternative Test.

PBGC stated in its initial determination of June 1975 that "the Portage Division pension plan in substance terminated prior to July 1, 1974," after considering several factors, including the accrual of benefits. *See infra* App. 1a. That conclusion was sustainable on the facts found by PBGC—*i.e.*, that there were only "insubstantial accruals and contributions with respect to the period subsequent to June 30, 1974." *Id.*; *see* Pet. App. 12a.

Furthermore, the agency considered the information which was subsequently supplied concerning the very small number of isolated payments made after June 30, 1974, several times over the course of approximately three years. *See, e.g.*, Pet. App. 39a, 43a. Three Executive Directors reviewed the facts

and arrived at the same conclusion. The PBGC Board of Directors was also involved in the process. That conclusion cannot fairly be characterized as "arbitrary, capricious and an abuse of discretion."

4. The Use of Permissible Criteria.

Petitioners argue very briefly that the criteria utilized by PBGC in applying the "other reasonable basis" standard were unlawful. Pet. 12. The petition fails to specify why the factors enumerated by the PBGC, *see* Pet. App. 32a, are inconsistent with the purposes of the law—other than to assert that they establish "an added stumbling block never contemplated by Congress." Pet. 12. In fact, all the criteria are relevant to a determination whether an operating pension plan for employees truly existed after June 30, 1974, and as both courts below concluded, it was proper for PBGC to utilize these criteria.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 6, 1984

APPENDIX

APPENDIX

PENSION BENEFIT GUARANTY CORPORATION

June 27, 1975

Mr. John W. Hill
Miller, Anderson, Nash,
Yerke & Wiener
900 S. W. Fifth Avenue
Portland, Oregon 97204

Dear Mr. Hill:

This is in response to your letter of May 15, 1975 concerning the Georgia-Pacific Portage Division pension plan (# 110-135).

According to the materials in this Corporation's files, Georgia-Pacific closed its Portage, Michigan plant in June 1974. All employees except two ceased employment by June 30, 1974. The two exceptions were employed on the first three days in July. All benefit accruals except for these two employees also ceased by June 30, 1974. The collective bargaining agreement tied Georgia-Pacific's contributions to hours worked and, except with respect to the two employees mentioned above, no contributions were made for work performed after June 30, 1974. In view of the insubstantial accruals and contributions with respect to the period subsequent to June 30, 1974, this Corporation has determined that the Portage Division pension plan in substance terminated prior to July 1, 1974. Consequently, Section 4082(b) of the Employee Retirement Income Security Act of 1974 does not authorize this Corporation to guarantee benefits upon termination of the Plan under the Act.

Accordingly, unless there are additional facts bearing on this matter which you bring to our attention within 30 days from the date of this letter, we will close our file on this case.

Sincerely,

GC:BLevine:bf:6/25/75
Steven E. Schanes
Acting Executive Director

cc: Paul J. Gross
United Paperworkers International Union

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W., Washington, D.C. 20006

Oct. 14, 1977

The Honorable Garry Brown
House of Representatives
Washington, D.C. 20515

Dear Congressman Brown:

This is in response to your letter to Mr. Ballard concerning the Georgia-Pacific Portage Division Plan. The Pension Benefit Guaranty Corporation (PBGC) file on termination of this plan is Case No. 110-135.

As you are aware, PBGC gave full consideration to the question of whether the termination of this plan led to termination insurance coverage under Title IV of the Employee Retirement Security Act of 1974. Mr. Kenneth Houck, then Executive Director of PBGC, informed you in a letter dated October 21, 1976, of the conclusion that coverage was not authorized. Mr. Matthew Lind instituted a review of the case after his appointment as Acting Executive Director. This review, which has been completed, did not reveal grounds for reopening the matter.

Although the PBGC attempts to carry on a continuing study and evaluation of its policies and interpretations, it is necessary to reach final decisions, on which parties may rely, in individual cases. The Georgia-Pacific decision represents the considered judgment of this Corporation, and there is no intention to reopen the matter.

I regret any misunderstanding that may have occurred as to the current status of this case, and I hope that this letter will clarify our position.

Sincerely,

Henry Rose
General Counsel